Town of Weaverville
Planning Board
Regular Monthly Meeting
Tuesday, October 4, 2022, 6:00pm

Agenda

1. Call to Order – Vice Chair Rachael Bronson
2. Approval of the Agenda
3. Approval of the Minutes from the September 6, 2022 Meeting of the Board
4. Discussion Related to Permissible and Impermissible Considerations for Legislative Development Decisions and Appropriate Conditions which can be Included in Conditional Zoning
5. Any Other Business
    - Updated Board Roster
6. Adjournment

TOWN OF WEAVERVILLE

PLANNING AND ZONING BOARD AGENDA ITEM

Date of Meeting: Tuesday, October 4, 2022

Subject: Minutes

Presenter: Planning Director

Attachments: Minutes from the September 6, 2022 Meeting of the Board

Description:

Attached you will find proposed minutes from the September 6, 2022 meeting of the Board

Action Requested:

Staff is requesting that the Planning and Zoning Board adopt the aforementioned minutes as presented or amended by motion of the Board.

Town of Weaverville
Planning Board
Minutes – Tuesday, September 6, 2022

The Planning Board of the Town of Weaverville met for a regularly scheduled monthly meeting at 6:00pm on Tuesday, September 6, 2022 within Council Chambers at Town Hall.

Present: Board Members Bob Pace, Mark Endries and Jane Kelley and Alternate Members Donna Mann Belt and Maggie Schroder, Councilmember Catherine Cordell, Town Attorney Jennifer Jackson and Planning Director James Eller. Vice Chair Rachael Bronson was absent.

1. **Call to Order**

The meeting was called to order at 6:00 pm.

Mr. Eller noted that in the absence of the chair and vice chair of the Board, the remaining members needed to nominate someone to chair the meeting. Also, the Board could use this opportunity to conduct the annual election of officers where the chair, vice chair and secretary could be nominated to serve in their capacity for one year or until reappointed. The Board indicated that they would conduct the annual election of officers at this time. With Ms. Bronson absent, Mr. Eller spoke on her behalf indicating that she was willing to continue in her capacity as vice chair.

Ms. Kelley motioned to appoint Mr. Pace as chair of the Board, Ms. Bronson as vice chair of the Board, and Mr Eller as secretary to the Board. Mr. Endries seconded the motion and all members voted in favor of the motion.

Mr. Pace recognized Ms. Mann Belt and Ms. Schroder as a regular members of the Board to fill the absences of regular members.

2. Approval of the Agenda

Noting no objections Mr. Pace declared the agenda approved by consent.

3. Approval of the Minutes from the July 5, 2022 Meeting of the Board

Ms. Mann Belt motioned to approve the minutes as presented. Ms. Kelley seconded and all voted unanimously in favor of the motion.

4. Annual Election of Officers

This action was taken at the beginning of the meeting.

5. Update of the Comprehensive Land Use Plan

Ms. Jackson noted that revisions to the adopted comprehensive land use plan must now be treated in the same manner as a zoning text amendment. Therefore, a recommendation from the Planning Board and public hearing will be required to update the plan to include the recently reviewed action plan table with priorities and fact

sheet. Mr. Eller noted that the action plan table was reflective of the position of Town Council, the Board, and staff from the recently conducted joint meeting of Council and the Board.

Ms. Kelley motioned to offer a favorable recommendation to Town Council on the updates to the CLUP including the action plan table with priorities and fact list. Ms. Mann Belt seconded and all voted in favor of the motion.

6. Sidewalk Priority List

Mr. Eller noted that the creation of a sidewalk priority list was made requisite by a recent zoning text amendment where sidewalk construction would be required of subdivisions and certain development approvals. This list could also serve as guidance where the town may consider sidewalk installation along town owner roads to provide greater access to the current sidewalk network and the downtown area.

Information related to Reeves Street, Florida Avenue, Georgia Avenue, Moore Street, Alexander Road, Clinton Street, Hamburg Drive, Aiken Road, Alabama Avenue, Park Avenue, Salem Road, Church Street and Yost Street was presented and discussed. During conversation it became the consensus of the Board to add College Crescent and portions of Brown Street and South College Street to the proposed sidewalk priority list. It also became the consensus of the Board to include the sidewalk priority list with the CLUP once adopted.

Ms. Mann Belt made a motion to offer a positive recommendation to Town Council on the proposed sidewalk priority list as amended and to include the list in the CLUP once adopted. Ms. Schroder seconded the motion and all voted unanimously.

7. Economic Development Advisory Committee Recommendation on an Amendment to the Table of Uses

Mr. Eller described a recommended text amendment to the table of uses for general retail establishments of a certain size within the C-1 Zoning District. Such recommendation is being offered from the Economic Development Advisory Committee.

Al Schlimm spoke to the Board on behalf of the Committee.

Ms. Schroder motioned to offer a positive recommendation to Town Council on the proposed text amendment to the table of uses. Mr. Endries seconded and all voted in favor of the motion.

8. Any Other Business

Mr. Eller presented an updated roster of the Planning Board reflective of the recent resignation of Mr. Burge.

9. Adjournment.

Without objection Mr. Pace declared the meeting adjourned.

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Bob Pace, Chair
Planning and Zoning Board

ATTEST:

_____

James W. Eller
Planning Director / Town Clerk

TOWN OF WEAVERVILLE

PLANNING BOARD AGENDA ITEM

Date of Meeting: Tuesday, October 4, 2022

Subject: Permissible and Impermissible Considerations for Legislative Development Decisions; Conditions in Conditional Zoning

Presenter: Planning Director

Attachments: University of North Carolina School of Government Coates' Canons Blog Postings

Description:

Staff anticipates a forthcoming conditional district application and, therefore, believes it to be valuable for the Board and Town Council to have a better understanding of permissible and impermissible considerations for legislative development decisions and conditions for conditional zoning.

Action Requested:

Staff is requesting a conversation with the Planning Board related to permissible and impermissible considerations for legislative development decisions and conditions for conditional zoning so the Board may offer appropriate and legal recommendations to Town Council on a forthcoming conditional district application for an affordable housing apartment complex.

https://canons.sog.unc.edu/2021/10/considerations-for-legislative-development-decisions/

Coates' Canons NC Local Government Law

Considerations for Legislative Development Decisions

Published: 10/07/21

Author Name: Adam Lovelady

A property owner has requested for the local government to rezone her property to allow for significant new development. This could bring substantial new investments, business, and residents. But it could also change the character of the place, burden public infrastructure, and alter neighborhood demographics. Should the local government approve the rezoning?

In general, legislative decisions such as zoning map amendments are left to the discretion of the governing board. Local elected officials may take in public opinion, technical analysis, and political judgment about what is in the best interest of the community. Some considerations are good and even required—planning board recommendation and comprehensive plan consistency, for example. Other considerations are off limits. Governing board members must not base decisions on the race, ethnicity, or religion of the applicant, landowner, or future tenants of the property.

This blog outlines those good and necessary considerations for legislative development decisions. A separate blog highlights the topics that are out of bounds.

Note that while some of these rules and concepts apply to other types of decisions, this discussion is focused on *legislative* development decisions. For an explanation of the types of development decisions, check out this blog.

General Considerations

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A proposal to rezone property or amend the zoning ordinance raises many important and appropriate issues and concerns. What are the land use impacts of this development for the individual property owner? The neighboring property owners? The broader community? The local government? If approved, what will this mean for economic development and environmental impacts, property rights and social equity, infrastructure and opportunity, and the community's vision for its future. Each of these are legitimate considerations for legislative zoning amendments.

Statutory Purposes and Considerations

General Statute 160D-701 sets forth the statutory purposes authorizing land use zoning regulation. To start, zoning regulations "shall be made in accordance with a comprehensive plan and shall be designed to promote the public health, safety, and general welfare." The state law expands on that broad notion to set forth additional public purposes for zoning: to prevent overcrowding, to reduce congestion in the streets, to provide safety from fire and dangers and to ensure efficient and adequate public facilities and services. Under the authorizing state law, zoning regulations must be made with reasonable consideration of the following, among other things:

- "the character of the district and its peculiar suitability for particular uses"
- "a view to conserving the value of buildings"
- "and encouraging the most appropriate use of land"

Consideration of the Comprehensive Plan

A comprehensive or land use plan is a vision for the community based on careful analysis of existing conditions, robust community engagement, and strategic prioritization by the local government leaders. Under G.S. 160D-501, North Carolina local government must have a comprehensive plan or land use plan that is reasonably up-to-date as a condition of having and enforcing zoning. It is appropriate—even required—for the governing board to consider the applicable plans when it considers an amendment to the development regulations. If there is a request to rezone land on the edge of town for a medium-density residential development, how does that align with the policies and priorities identified by the community in the comprehensive plan? Is the site identified for infrastructure investment and residential development? Or, is the area identified to be maintained for low-density, agricultural uses? The community's adopted vision should be considered when deciding about amendments to the development regulations.

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For amendments to the zoning regulations, state law requires consideration of the comprehensive or land use plan. G.S. 160D-605 requires that the governing board must approve a statement describing whether and how an action is consistent or inconsistent with the applicable plan. While the comprehensive plan or land use plan is not binding—the governing board may adopt a rezoning even if that action is inconsistent with the applicable plans. But, there is a procedural requirement to consider the applicable plans in the process. While consideration of the comprehensive plan is not required under state law for other legislative actions, such consideration is still appropriate and recommended for other legislative development matters such as adoption or amendment of the subdivision ordinance, minimum housing code, or other development regulations.

For more detail, check out this 160D Guidance Document on Plan Consistency Statements.

Recommendations from Staff and Planning Board

A governing board can and should consider the recommendations of the planning board and local government staff when deciding on a rezoning or text amendment. General Statute 160D-604 specifically requires that amendments to the zoning ordinance (text or rezoning) must be referred to the planning board for review and comment. Other development ordinances (subdivision, minimum housing, etc.) *must* be submitted for planning board review for initial adoption and *may* be submitted for planning board review for subsequent amendments. When reviewing proposed legislative actions, the planning board considers plan consistency, among other things.

Typically, a local government provides for careful staff review of a proposal prior to it going to the planning board and governing board. The local government staff review may include technical analysis of the range of permitted uses and adequacy of public infrastructure and services, policy analysis of the extent to which a proposal aligns with adopted plans and policies, and fiscal analysis of the projected financial impacts of a proposed development or ordinance amendment, and other analyses as required by the local government policies.

As with the comprehensive plan, recommendations are not binding. A governing board may take action despite the recommendations from staff and boards. But, if a community finds that the governing board frequently takes action in contrast to the plans and recommendations, that may be an indication the community needs to update the plans or reconsider the expectations of review by the planning board and staff.

Consideration of All Uses

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When it comes to a conventional rezoning—shifting from one standard zoning district to another standard zoning district—the governing board must consider the full range of uses permitted in the proposed district (See *Hall v. Durham*, 323 N.C. 293 (1988)). If the rezoning is approved, then the property owner will have rights to proceed with any of the allowed uses, so the governing board must give consideration to those uses. This is true even if the developer shows illustrative plans for what they hope to build. For example, if a developer seeks rezoning to the general Highway Commercial zoning district, the developer may indicate in the application materials or hearing that they plan to build a gas station and convenience store. If the rezoning is approved, though, the developer could move forward with a truck stop, big box store, storage facility, or any other uses permitted in the district.

For a conventional rezoning, the question is this: Would this zoning district *and the full range of the allowable uses* be appropriate in this location? (Not this: Would the specific proposed use and development be appropriate in this location?) In contrast, conditional zoning and special use permits are appropriately focused on a specific proposal and the approval may be conditioned on a particular site plan.

Conditions, When Appropriate

Conditional rezoning allows for site-specific conditions to be added to the rezoning. As authorized under G.S. 160D-703, a conditional zoning district must be proposed by the property owner and any conditions must be mutually agreed to by the local government and the property owner. While there is some flexibility for the substance of the conditions, they are limited to conditions that address the development's conformance with applicable plans and the impacts reasonably expected to be generated by the development.

Conditions may include, among other things, limits on the allowable uses at that site. So, whereas a *standard rezoning* must consider all permissible uses, a *conditional rezoning* may be conditioned to limit the allowable uses.

For more detail, check out this 160D Guidance Document on Conditional Zoning.

Reasonableness for Rezoning

Courts generally defer to the judgment of elected officials to make decisions about what is in the best interest of the community. But spot zoning—when a small area is zoned in a way that is different from surrounding area—receives heighted judicial scrutiny to ensure that the decision is in the public

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interest. Treating one parcel differently from the surrounding property raises concerns that the zoning may unfairly benefit or harm that owner (or the neighbors) or that improper factors—such as favoritism or antagonism toward an individual—may have motivated that zoning decision.

If spot zoning is challenged in court, the court will not presume the zoning to be valid, but rather will review the zoning very carefully to ensure that it is reasonable and in the public interest. North Carolina law permits spot zoning, but only if a local government can establish that a particular spot zoning is reasonable. As set forth in *Chrismon v. Guilford County*, 322 N.C. 611 (1988), North Carolina courts apply a set of factors to determine if a spot zoning is reasonable: (i) the size and nature of the tract; (ii) compatibility with existing plans; (iii) the impact of the zoning decision on the landowner, the immediate neighbors, and the surrounding community; and (iv) the relationship between the newly allowed uses in a spot rezoning and the previously allowed uses.

As protection against challenges of spot zoning for small scale rezonings, G.S. 160D-605 requires the governing board to adopt a statement of reasonableness along with the statement of plan consistency. For this statement the board may consider, among other factors,

(i) the size, physical conditions, and other attributes of the area proposed to be rezoned,

(ii) the benefits and detriments to the landowners, the neighbors, and the surrounding community,

(iii) the relationship between the current actual and permissible development on the tract and adjoining areas and the development that would be permissible under the proposed amendment;

(iv) why the action taken is in the public interest; and

(v) any changed conditions warranting the amendment.

For more detail, check out this blog on Spot Zoning.

Conclusion

These are some of the specific topics that the governing board definitely should consider for legislative development decisions. For a summary of the impermissible considerations—the topics that are out of bounds for legislative development decisions—check out the companion blog. And check out this blog for more on the Procedures for Legislative Decisions.

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Coates' Canons NC Local Government Law

Impermissible Considerations for Legislative Development Decisions

Published: 10/15/21

Author Name: Adam Lovelady

"We don't want those people to move in here!" "A church may be okay, but not a mosque!" "We need condos, not apartments!" These are a few of the many statements that raise red flags in a zoning matter. In general, legislative decisions such as zoning map amendments are left to the discretion of the governing board. There are many valid considerations for whether to approve the change: adopted plans and policies, technical analysis, judgment about what is in the best interest of the community, and more.

But there are limits. Some topics are out of bounds, and zoning decisions must not be based on those factors. This blog highlights those impermissible considerations.

A separate blog outlines the considerations that are good and necessary for legislative development decisions. Note that while some of these rules and concepts apply to other types of decisions, this discussion is focused on *legislative* development decisions. For an explanation of the types of development decisions, check out this blog.

Race, Religion, Ethnicity and Other Characteristics

Land use decisions may not be based on the race, religion, ethnicity, or other protected classifications of individuals. In the early twentieth century some zoning ordinances in North Carolina were explicitly racial. Zoning districts were specified by race—some for white residents and some of black residents. The North Carolina Supreme Court struck down such racial zoning in 1940 in *Clinard v. City of Winston-Salem*, 217 N.C. 119. Even after explicit racial zoning was struck down, race continued to play

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a role in zoning decisions in North Carolina. A study by urban planning scholar Andrew Whittemore of zoning decisions in mid- to late-20th century Durham found that "race historically played a role in upzonings and downzonings involving heavy commercial and industrial uses."

State and federal law now prohibits such decision-making based on the character of the owners or residents of a development project. The North Carolina Fair Housing Act states "[i]t is an unlawful discriminatory housing practice to discriminate in land-use decisions or in the permitting of development based on race, color, religion, sex, national origin, handicapping condition, [or] familial status . . ." (G.S. 41A-4(g)). Equal Protection under the federal Constitution demands that similarly situated individuals be treated the same and demands heightened judicial review of discrimination. Federal statutory and Constitutional protections require that governmental actions not discriminate on the basis of religion. And federal and state law provides protections against housing discrimination and protections for individuals with disabilities.

The U.S. Supreme Court, in *Village of Arlington Heights v. Metropolitan Housing Development Corp*., 429 U.S. 252 (1977), set forth the sources of information that may reveal impermissible considerations of race: the historical background of the decision or a clear pattern unexplainable except by race; the sequence of events leading up to the decision (such as a sudden downzoning when affordable housing was proposed); the legislative and administrative history, including reports, minutes, and statements by the decision-makers; departures from the normal procedural sequence; and departures from typical substantive decisions (given the standard considerations, would the board normally make a different decision). Discriminatory intent can be hard to prove—and was not proven in the *Village of Arlington Heights* case—but the Court outlined a wide range of sources where illegitimate intent may be revealed.

While there is a legacy of discrimination in land use zoning, state and federal law demands that lang use decisions today must be based on the land use, not discrimination against a particular person or group of people.

Inclusion of Affordable Housing

In addition to the protections outlined above, the North Carolina Fair Housing Act also provides protection against a denial of a development project because it includes affordable housing. Specifically, the law states that "[i]t is an unlawful discriminatory housing practice to discriminate in land-use decisions or in the permitting of development based on . . . the fact that a development or proposed development contains affordable housing units for families or individuals with incomes

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below eighty percent (80%) of area median income." Moreover, it is a violation if "the local government was motivated in full, or in any part at all, by the fact that a development or proposed development contains affordable housing units." And, "[a]n intent to discriminate may be established by direct or circumstantial evidence." There is one exception: It is not a violation of the North Carolina Fair Housing Act if the action was based on limiting high concentrations of affordable housing. ((G.S. 41A-4(g) & 41A-5).

Lack of Any Land Use Rationale

Apart from discrimination, governing boards have fairly broad discretion for making land use decisions. Courts typically defer to the local political decision by the local decision-makers. But there must be *some valid land use rationale* for a decision. A decision that is without rationale is, at a minimum, unconstitutional as arbitrary and capricious, and may indicate that an illegitimate reason (racial discrimination, for instance) underlies the supposed reasons for the decision.

As an example, in *Gregory v. County of Harnett*, 128 N.C. App. 161, 493 S.E.2d 786 (1997), the court found a rezoning to be arbitrary and capricious. The county commission approved a down-zoning submitted just three days after a nearly identical request was denied. The court's review of the record found that the decision-makers based their decision on "complaints by various citizens of an undocumented crime problem allegedly arising from a manufactured home park." One commissioner thought a manufactured home park was not in keeping with the neighborhood and another stated he did what he thought was best for the county. "[A]t least one Commissioner stated the alleged crime problem was the result of the type of people who live in manufactured home parks." The court, however, found "no evidence in the record showing that the Commissioners considered the character of the land, the suitability of the land for the uses permitted in the proposed zoning district, the comprehensive plan, or the existence of changed circumstances justifying the rezoning application." Based on the indication of invalid considerations and the lack of valid considerations reflected in the record, the court found the action to be arbitrary and capricious.

In another case, *Town of Green Level v. Alamance County*, 184 N.C. App. 665, 646 S.E.2d 851 (2007), the court reviewed action by the county to extend zoning in opposition to a proposed expansion of extraterritorial jurisdiction. The court found no evidence in the record of the commissioners reviewing the comprehensive plan nor evidence to support the claim that the ordinance was set up to protect water resources. The claim that the zoning would protect rural character was contradicted by the allowance

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for significant manufacturing uses. The court found the zoning was adopted to block extraterritorial jurisdiction, not to advance legitimate health, safety, or welfare purpose. As such, it was arbitrary and capricious.

There must be a legitimate rationale for a land use decision—the appropriateness of land uses, the policies of the comprehensive plan, the availability of public infrastructure and services for example. It is helpful if that rationale is clearly seen in the governing board's discussion and statement of rationale. In the two cases above, the courts found no legitimate rationale, the decisions were arbitrary and capricious, and there was indication that illegitimate considerations were behind the decisions.

Particular Applicant, Tenant, or Owner

"Unless provided otherwise by law, all rights, privileges, benefits, burdens, and obligations created by development approvals made pursuant to this Chapter [160D] *attach to and run with the land*" (G.S. 160D-104). Land use decisions are decisions about the land and the rights and obligations stay with the land. Decisions are not specific to an applicant or owner. As such, when an applicant seeks a permit or rezoning, decision-makers must consider the proposal, not the person. Indeed, land changes hands all of the time. Suppose Tom obtains a rezoning for his property. He may sell the property to Samantha tomorrow. Samantha will have all of the rights and obligations for land development that Tom had.

This line of thinking goes further: Land use decisions and regulations must not be based on ownership status. Land use decisions are about land use, not about the form of ownership of the development. A multi-family development has the same land use impacts whether it is owner-occupied condominiums or renter-occupied apartments. This issue was addressed in *Graham Court Associates v. Town Council of Chapel Hill*, 53 N.C. App. 543, 281 S.E.2d 418 (1981). The town ordinance required different permitting and standards for condominiums as compared to apartments. The court ruled that zoning can regulate land use, but not the form of ownership.

Additionally in *City of Wilmington v. Hill*, 189 N.C. App. 173, 657 S.E.2d 670 (2008), the court ruled against a land use regulation based on form of ownership. The city's ordinance permitted a garage apartment as an accessory use in a single-family zoning district, but required that the property owner must live in either the main residence or the accessory apartment. The court held the ownership requirement to be beyond the scope of delegated zoning powers and unconstitutional as an impermissible regulation of ownership rather than a permissible regulation of land use.

Private Interest over Public Interest

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A legislative development decision is a decision for the community. It sets broad policy for what is allowed and not allowed within the jurisdiction. As such, elected officials must based the decision on the public interest, not private gain.

Even if a board member thinks she may approach a case fairly, there are some matters that demand the board member to recuse herself from the case. General Statute 160D-109 states that a governing board member shall not vote on a legislative matter "where the outcome of the matter being considered is reasonably likely to have a direct, substantial, and readily identifiable financial impact on the member." So, a board member may not participate in a legislative development decision where she owns the property at issue, she is financially involved with the development, or she will otherwise have a *direct, substantial, and readily identifiable* financial impact from the outcome of the case.

Additionally, a board member shall not vote on a zoning amendment "if the landowner of the property subject to a rezoning petition or the applicant for a text amendment is a person with whom the member has a close familial, business, or other associational relationship." If the applicant for the rezoning or text amendment is a spouse, business partner, or close friend to a board member, that board member must recuse herself.

There is an important distinction for conflicts of interest in legislative matters as compared to conflicts in quasi-judicial matters: impartiality. In a quasi-judicial matter, the board is acting like a court and due process requirements demand that the board members must be impartial decision-makers. They must not have a fixed opinion for or against a particular proposal. In contrast, for legislative matters the board is acting as a legislative body. They can take politics into account and they may have previously stated their position on an issue or a case. Having a fixed opinion is not an automatic conflict of interest in a legislative development decision (See *Brown v. Town of Davidson*, 113 N.C. App. 553 (1994)). Indeed, a governing board member may have run for office with a campaign platform for or against a particular project. That member could still participate in a legislative development decision, but could not participate in a quasi-judicial development decision.

Protection of Particular Uses

This blog outlines some of the considerations that are off limits for development decisions. Note that there are also particular uses that have specific constitutional or statutory protections, such as those outlined in Article 9 of Chapter 160D. Manufactured homes, adult businesses, cell towers, family care homes, places of worship, billboards, and many other uses have certain procedural and substantive protections. Those issues are important, but beyond the scope of this blog.

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Conclusion

These are some of the specific topics that are out of bounds for legislative development decisions. For a summary of the good considerations—the topics that the governing board definitely should consider—check out the companion blog here. And check out this blog for more on the Procedures for Legislative Development Decisions.

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Coates' Canons NC Local Government Law

What Conditions Can Be Included in Conditional Zoning?

Published: 11/11/21

Author Name: David Owens

Conditional zoning is a popular development regulation tool used in North Carolina. Legislative conditional zoning was first used in the state in the 1990s, was approved by the courts in 2001, and was expressly authorized by the zoning statutes in 2005. It is now the most frequently made rezoning in the state. With this widespread use comes the question of just what conditions can be included in a conditional rezoning.

The standards in traditional conventional zoning districts (sometimes referred to as general use districts) must be uniformly applied throughout a city or county. The same permitted uses and dimensional standards apply to all property placed in the same zoning district. No site-specific, individualized conditions are allowed. Every property within a particular zoning district, no matter where it is within the city or county, is subject to exactly the same zoning rules.

By contrast, G.S. 160D-703(a)(2) authorizes cities and counties to adopt conditional zoning districts that can include individualized development conditions. If the local government wants to allow some of the permitted uses within a proposed zoning district, but not all of them, it can accomplish that through use of conditional zoning. A fairly common practice of local governments is to amend their zoning text to create a set of conditional zoning districts that parallels their conventional districts. For example, if there is a "Highway Commercial" district, the text would also include a "Highway Commercial-Conditional" district. Then an individual rezoning to the "Highway Commercial-Conditional" would include conditions applicable only to that site. That includes changes to the permitted uses and dimensional standards that would otherwise apply in the regular "Highway Commercial" zoning

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district. Conditional zoning is a way to allow a landowner to make a use of property that they desire while incorporating conditions that address the concerns of neighbors or local government. For more on the difference between conventional and conditional zoning, see this **post** and this Ch. 160D **guidance document** on conditional zoning.

Conditional zoning is very popular in North Carolina. In our **2018 SOG survey**, over half of the responding local governments reported use of conditional zoning. Its use is particularly common in larger population cities, with 77 percent of the cities with populations over 25,000 reporting use of conditional zoning. Not only do many local governments make this option available, it is often applied. In our survey, the responding jurisdictions reported that 55 per cent of all rezonings considered in the previous year were rezonings to conditional districts. 78 percent of all rezonings were conditional rezonings in cities with populations over 25,000.

Given this widespread use, a question invariably arises. What type of conditions can be included in a conditional rezoning?

Basic Limits

The general factors that can legitimately be considered in a rezoning, and those that cannot, apply to conditional zoning. For example, it is entirely appropriate to consider the land use impacts of a proposed development and what the comprehensive plan suggests, while it would be illegal to base a decision on the racial, ethnic, or religious identity of the applicant or the identity of the property owner. My colleague Adam Lovelady discusses legitimate and appropriate considerations for legislative zoning decisions **here** and improper considerations **here**. These factors fully apply to conditional rezonings. Also, conditional zoning will often also be "**spot zoning**," so the factors necessary to show that the zoning is reasonable should be addressed in the rezoning process.

Two Additional Statutory Limits

When conditional zoning is involved, there are two important statutory limits that also must be considered.

First, both the landowner and the local government must agree to place property into a conditional zone and they must also agree on the specific conditions imposed. The landowner does not have to like being in a conditional district. The owner might well prefer that their property be in a conventional zoning district with a wider range of permitted uses and fewer development restrictions. However, the city or

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county governing board may conclude that such a rezoning would allow some uses or development plans that would be harmful to the neighbors or the public. Conditional zoning allows the owner and local government to find a mutually acceptable alternative to the traditional zoning.

G.S. 160D-703(b) provides that property may only be placed in a conditional zoning district "in response to a petition by all of the owners of the property to be included." This required "petition" can take the form of a rezoning application or a written request or agreement that a pending rezoning be made a conditional rezoning. If a landowner objects to being in a conditional district, the local government cannot put the property in one. This statutes goes on to provide that while either the owner or the local government may propose specific conditions, "only those conditions approved by the local government and consented to by the petitioner in writing may be incorporated into the zoning regulations." If an owner objects to a proposed condition, it cannot be included. When the owner objects to a particular condition, the local government has the choice of approving the conditional zoning without the objectionable condition or denying the conditional rezoning if the governing board concludes the rezoning without that condition would be inappropriate.

Second, the zoning statute limits the scope of conditions that can be imposed. G.S. 160D-703(b) says that the conditions imposed in a conditional rezoning are limited to those that address conformance of the development and use of the site to local government ordinances and adopted plans and to those conditions that address "impacts reasonably expected to be generated by the development or use of the site." This section of the statutes also says that conditions "not authorized by otherwise applicable law," including taxes, impact fees, building design elements for single-family homes, and excess drive-way improvements, cannot be included "unless consented to by the petitioner in writing."

So, the local government does not have unlimited discretion in imposing conditions. In addition to the standard constitutional and statutory limits on zoning regulations, all the conditions must be approved by the landowner and they must be tied to securing compliance with adopted ordinances or plans or be reasonably related to minimizing potential impacts of the proposed development. Written approval by the owner to being placed in a conditional zone and to the specific conditions imposed is required.

Potential Conditions

Not surprisingly, the two most used conditions are ones that limit the range of permitted uses and that require a detailed site plan for future development of the site. Both types of conditions are permissible in North Carolina. Over 70 percent of the jurisdictions responding to our 2018 survey reported that their conditional zoning either always or frequently included these two conditions.

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Use Restrictions. A conventional zoning district typically allows dozens of different land uses. Some of those uses may have modest land use impacts for the neighbors, while others might be problematic in a particular setting. A condition imposed on a conditional zoning can allow a specific use on a specific parcel that the owner desires while ruling out other uses that are objectionable to the neighbors or local government if placed on that property. A condition can also expand the range of permitted uses, such as allowing a range of mixed uses within a building or allowing a wider range of uses on a larger site, but it more often restricts the uses that would have been allowed in a comparable conventional zoning district. Some zoning regulations allow only conditions that are more stringent than those in the corresponding conventional zoning district while other local ordinances allow any modifications deemed appropriate. State law allows either approach.

Site plans. A site plan incorporated into a conditional rezoning can identify where roads, buildings, parking, particular uses, and buffers will be located. It can provide information on landscaping or stormwater management, although details on these aspects of the development may be addressed later in the permitting process. Securing agreement on the site plan for the forthcoming development at the rezoning stage provides clarity for the owner, developer, and neighbors as to how the development will proceed. It shows how potential adverse impacts will be addressed and minimized. A clear site plan helps assure that there will not be unpleasant surprises for any of the affected parties as the development materializes.

Site development details. A related set of permissible conditions are often used to address specific aspects or details of the potential development. While not quite as frequently employed as the two conditions noted above, over 50 percent of jurisdictions responding to our 2018 survey reported frequently using these types of conditions.

While a commercial district might require that buildings have a 25-foot setback from the rear property line, a conditional district could increase that to a 50-foot rear yard setback to address potential negative impacts on neighboring residential properties. Other measures could be required to buffer approved development from neighboring properties, such as requiring a solid fence at a specified location, additional landscaping, or restrictions on exterior lighting. Alternatively, the setback in a conditional district could be reduced if a smaller setback would provide an adequate distance for the particular development and setting. How streets within the development connect to neighboring streets can be specified. The location and design of driveways can be specified. A condition could set the maximum density of future residential development to assure that there are adequate streets, utilities, schools, and recreational facilities to support the development. The design of buildings can be specified

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to assure harmony with their surroundings. G.S. 160D-702(b) allows the imposition of building design standards even on single-family homes if that is voluntarily consented to by the owners as part of seeking approval of a rezoning. Sometimes something as simple as a condition specifying the location and screening of trash dumpsters or the hours of operation of a commercial use can be the key to resolving potential conflicts between the developer and the neighbors. As with the range of permitted uses, a zoning regulation can restrict these detailed conditions to those that are more stringent than the corresponding traditional district or it can allow any modification deemed appropriate.

Infrastructure. For some developments, particularly those that are very large, securing adequate supporting infrastructure is a key consideration in development approval. The location, construction standards, and financing of roads, utilities, schools, parks, and greenways are important for both the developer and the local government. Details on how this is to be accomplished can be incorporated into the conditions included in a conditional rezoning. These types of conditions are permissible but are less commonly imposed.

If there is to be substantial cost-sharing or the voluntary provision of extra public benefits, it would be prudent for the local government and the landowner to use a development agreement in addition to conditional zoning. G.S. 160D-1006(d) allows a development agreement to include mutually acceptable provisions for financing public facilities, provided that any measures offered by the developer beyond those that could be required by the local government are expressly set out in the agreement. While these additional measures in a development agreement cannot include a tax or impact fee not otherwise authorized, they can include a wide range of possible conditions, including donations of land and construction of public and community facilities. Development agreements can include, for example, an agreement to donate land for a school or a fire station, relocation of a road, or even construction of a building for a community nonprofit (such as a YMCA) – items that could not be mandated unilaterally by the local government, but which can be included in the agreement with the voluntary written consent of the landowner. The statutes antincipate that a development agreement and a conditional rezoning for a project will sometimes be negotiated and approved at the same time. G.S. 160D-1003(b) allows for a development agreement and a rezoning to be considered concurrently and for a development agreement to be incorporated into a conditional rezoning. When this is done, one of the conditions generally included in the conditional rezoning is compliance with all the terms and conditions of the accompanying development agreement.

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Social equity. A final set of conditions that are sometimes considered are those that address social equity concerns. While common in some states, this type of condition has to date not been frequently applied in North Carolina. These types of conditions are not specifically addressed by our statutes or cases. However, they may be proposed to secure plan compliance or to address impacts of the development. For example, some North Carolina comprehensive plans call for a full range of housing affordability in new developments. Other plans may address the need for more affordable and work-force housing. In response, some conditional zonings and development agreements have included agreement on provision of a specified amount of affordable housing or commitments to make payments to a local affordable housing trust fund.

Developers of some projects are willing to commit to employment of local workers or those under-represented in the workforce, to provide job training programs, or to undertake similar initiatives. In some states community benefit agreements are used, where the developer and community organizations negotiate and adopt agreements prior to or as a part of the development approval process. These agreements can build community support for a development by assuring that members of the community, as well as the developer, benefit from the development. The degree to which a local government can enforce such an agreement if it is incorporated or referenced in a conditional zoning, or whether only the parties can do so, is unclear in North Carolina.

While it is likely that these social equity conditions can be included in a conditional rezoning and in a development agreement if both the owner and the local government are agreeable, it is particularly important to secure written consent for their inclusion from the landowner. Given their novelty and the lack of express statutory authority to use them, considerable legal care is warranted if they are to be considered.

Impermissible conditions. There remain a few issues that cannot be addressed by conditional zoning conditions. As noted at the outset, factors that are impermissible to be considered in any zoning regulation cannot be addressed by conditions in conditional zoning. Racial, ethnic, or religious discrimination are not permitted. A condition cannot regulate who owns the development or whether it is owner or renter occupied.

Final Considerations

The conditions incorporated into a conditional rezoning should be clearly stated and should incorporate all key provisions that have been agreed to by the landowner and the local government. If a condition is discussed and informally agreed to, but it is not included in the adopted rezoning, it is not legally

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enforceable.

That said, it is important to be careful about how much detail is incorporated into the conditions. After all, once adopted the conditions become mandatory zoning standards with the force of law. While the regulations can allow **minor modifications** to be made administratively, all **major modifications** must go through the entire zoning amendment process (click for details on each). It may be desirable to leave some flexibility about the details of the approved project or to address those details at the permitting stages of development that happen after a rezoning. Just how much detail or flexibility is desired, and on which aspects of the development, is a policy and practical choice that should be considered.

Finally, administration and enforcement of the zoning should be considered. Adequate record keeping, staff support to inspect for compliance and enforce conditions, and education of the landowner and neighbors are all critical for the ongoing success of conditional zoning. Creating individualized, site-specific development regulations creates a substantially more complex regulatory program than reliance on conventional zoning districts with uniform standards for all property in a particular district. While the benefits may well outweigh these costs, a local government embarking upon extensive use of conditional zoning should keep this in mind.

In sum, conditional zoning is a valuable tool that allows development regulations to be carefully tailored to individual sites and particular development schemes. It allows reasoned negotiation and appropriate balancing of landowner, neighborhood, and governmental interests. Properly applied, it serves the legitimate interests of all involved. A good understanding of the scope of permissible conditions will help those involved navigate this complex process in a fair, reasonable, and legally defensible fashion.

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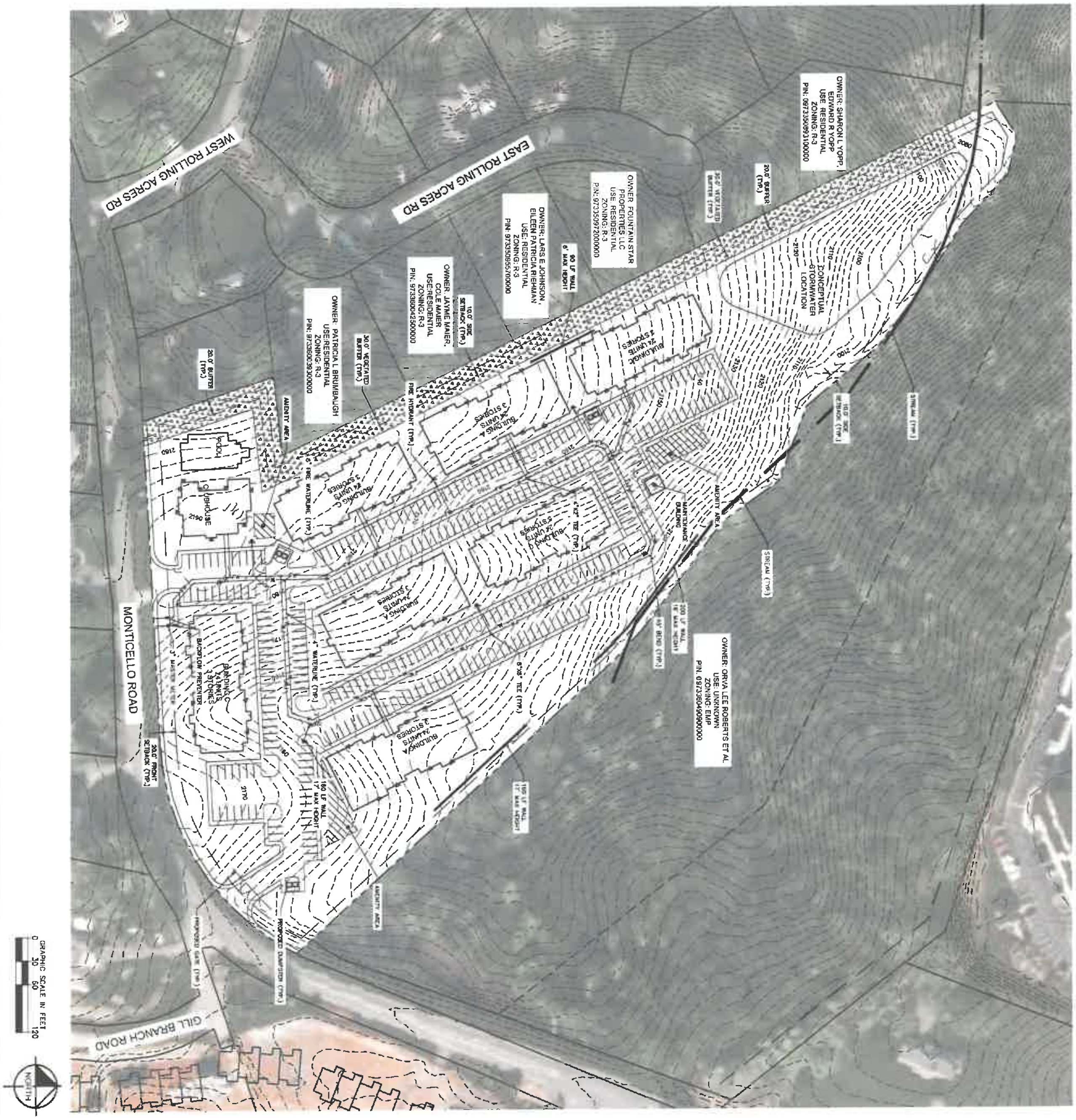

SITE DATA TABLE

DEVELOPMENT NAME	171 MONTICELLO ROAD
DEVELOPER	LDG DEVELOPMENT, LLC
PIN	9733603503000000
ZONING	R-3
OVERLAY DISTRICT(S)	NONE
TIER	SUBURBAN
CURRENT USE	SINGLE-FAMILY RESIDENTIAL
PROPOSED USE	180 MULTIFAMILY APARTMENT UNITS AND ASSOCIATED AMENITY SPACE
PROPOSED DENSITY	168 UNITS/10.68 ACRES = 15.73 UNITS PER ACRE
PROJECT BOUNDARY BUFFERS	MONTICELLO ROAD: 30' STREET YARD NORTH: 20' LANDSCAPE BUFFER, 25' SIDE YARD WEST: 20' LANDSCAPE BUFFER, 25' SIDE YARD EAST: 20' LANDSCAPE BUFFER, 25' SIDE YARD
BUILDING HEIGHT	BUILDING A (XX'), BUILDING B (XX'), CLUBHOUSE (XX')
EXISTING PARCEL AREA	±10.68 ACRES
FLOOD HAZARD	FLOOD ZONE: X FEMA FIRM #: 3700973300J EFF. 01/08/2010
PROPOSED MULTIFAMILY PARKING	1.75 SPACES/UNIT = 294 SPACES

SITE LEGEND

- PROPERTY / RIGHT-OF-WAY LINE
- SETBACK LINE
- BUFFER LINE
- STORMWATER CONTROL MEASURE LINE
- PROPOSED WALL
- STREAM

SHEET NUMBER	EX-2

171 MONTICELLO RD
PREPARED FOR
RICKHAUS DESIGN, LLC
DURHAM NORTH CAROLINA

CONCEPTUAL SITE PLAN

KHA PROJECT	014280001
DATE	8/5/2022
SCALE	AS SHOWN
DESIGNED BY	KWH
DRAWN BY	CEA
CHECKED BY	KWH

PRELIMINARY NOT FOR CONSTRUCTION

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No.	REVISIONS	DATE	BY

TOWN OF WEAVERVILLE

PLANNING BOARD AGENDA ITEM

Date of Meeting: Tuesday, October 4, 2022

Subject: Any Other Business

Presenter: Planning Director

Attachments: Updated Planning Board Roster

Description:

The updated Planning Board roster is provided for informational purposes only and is reflective of the recent Board appointments and the annual election of officials.

Action Requested:

None.

WEAVERVILLE PLANNING BOARD				
Regularly meets 1st Tuesday of the month at 6 pm in Community Room/Council Chambers at Town Hall				
NAME AND POSITION	**CONTACT INFORMATION**	**FIRST APPT**	**DATE OF APPT**	**TERM (3 YEARS)**
Bob Pace Regular Member Chair	116 Mountain Meadow Circle 919-434-6938 ncstman@gmail.com	2020	September 2022	September 2022 – 2025
Rachael Bronson Regular Member Vice Chair	31 Reynolds Lane 843-327-6709/828-229-1838 rachael.bronson@gmail.com	2019	September 2022	September 2022-2025
Mark Endries Regular Member	9 Grove Street 828-423-0035 (cell) markendries@hotmail.com	2021	March 2022	March 2022 - Sept 2024
Jane Kelley Regular Member	31 Moore Street 843-801-5100 jane.kelley2@yahoo.com	2021	November 2021	November 2021 – Sept 2023
Donna Mann Belt Regular Member	53 Highland Street 903-530-2967 (cell) donnaleemann@gmail.com	2021	September 2022	September 2022 – 2023
Maggie Schroder Alternate Member	32 Alexander Drive 919-610-7207 schrodermaggie@gmail.com	2022	September 2022	September 2022 – 2025
Alternate Member				___ – Sept 2024
Catherine Cordell *Non-Voting Town Council Liaison*	13 Hamburg Drive (cell) 776-7380 ccordell@weavervillenc.org	2021	December 2021	TBD
James Eller Town Planner	828-484-7002 (direct line) jeller@weavervillenc.org			
Jennifer Jackson Town Attorney	828-442-1858 (cell) jjackson@weavervillenc.org			

Last updated September 2022